

SENATE BILL No. 325

DIGEST OF INTRODUCED BILL

Citations Affected: IC 34-57-2.5.

Synopsis: Uniform mediation act. Permits the use of voluntary or required mediation to assist parties in resolving a dispute, with the exception of: (1) a dispute related to a collective bargaining agreement; (2) mediation conducted by a judge who will make a ruling in the case; (3) mediation conducted under the auspices of a primary or secondary school if all the parties are students; or (4) mediation conducted under the auspices of a juvenile correctional facility if all the parties are residents of the institution. Provides that communications made in mediation are generally privileged, subject to waiver and other exceptions. Prohibits a mediator from making certain substantive disclosures to a court or other agency that may make a ruling on the case but permits a mediator to disclose procedural matters. Prohibits the use of a mediator with a potential conflict of interest unless the conflict is disclosed to the parties and waived.

Effective: July 1, 2004.

Simpson

January 12, 2004, read first time and referred to Committee on Judiciary.

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Second Regular Session 113th General Assembly (2004)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2003 Regular Session of the General Assembly.

SENATE BILL No. 325

A BILL FOR AN ACT to amend the Indiana Code concerning civil procedure.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 34-57-2.5 IS ADDED TO THE INDIANA CODE
2 AS A **NEW** CHAPTER TO READ AS FOLLOWS [EFFECTIVE
3 JULY 1, 2004]:

4 **Chapter 2.5. Uniform Mediation Act**

5 **Sec. 1. This chapter may be cited as the uniform mediation act.**

6 **Sec. 2. The following definitions apply throughout this chapter:**

7 (1) "Mediation" means a process in which a mediator
8 facilitates communication and negotiation between parties to
9 assist them in reaching a voluntary agreement regarding their
10 dispute.

11 (2) "Mediation communication" means a statement, whether
12 oral or in a record, or verbal or nonverbal, that occurs during
13 a mediation or is made for purposes of considering,
14 conducting, participating in, initiating, continuing, or
15 reconvening a mediation or retaining a mediator.

16 (3) "Mediator" means an individual who conducts a
17 mediation.



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(4) "Nonparty participant" means a person, other than a mediation party or mediator, that participates in a mediation.

(5) "Mediation party" means a person that participates in a mediation and whose agreement is necessary to resolve the dispute.

(6) "Person" means an individual, a corporation, a business trust, an estate, a trust, a partnership, a limited liability company, an association, a joint venture, a government, a governmental subdivision, an agency, an instrumentality, a public corporation, or any other legal or commercial entity.

(7) "Proceeding" means a judicial, an administrative, an arbitral, or other adjudicative process, including related prehearing and post hearing motions, conferences, and discovery.

(8) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in a perceivable form.

(9) "Sign" means:

(A) to execute or adopt a tangible symbol with the present intent to authenticate a record; or

(B) to attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate a record.

Sec. 3. (a) Except as provided in subsection (b) or (c), this chapter applies to a mediation in which:

(1) the mediation parties are required to mediate by a statute, a court, or an administrative agency rule or are referred to mediation by a court, an administrative agency, or an arbitrator;

(2) the mediation parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure; or

(3) the mediation parties use as a mediator an individual who holds himself or herself out as a mediator or the mediation is provided by a person that is not an individual and that holds itself out as providing mediation.

(b) This chapter does not apply to a mediation:

(1) relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship;

(2) relating to a dispute that is pending under or is part of the processes established by a collective bargaining agreement, except that this chapter applies to a mediation arising out of

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a dispute that has been filed with an administrative agency or court;

(3) conducted by a judge who might make a ruling on the case; or

(4) conducted under the auspices of:

(A) a primary or secondary school if all the parties are students; or

(B) a correctional institution for youths if all the parties are residents of that institution.

(c) If:

(1) the parties agree in advance in a signed record; or

(2) a record of proceeding or record on appeal reflects agreement by the parties;

that all or part of a mediation is not privileged, the privileges under sections 4 through 6 of this chapter do not apply to the mediation or part of the mediation agreed upon. However, sections 4 through 6 of this chapter apply to a mediation communication made by a person if the person has not received actual notice of the agreement before the communication is made.

Sec. 4. (a) Except as provided in section 6 of this chapter, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by section 5 of this chapter.

(b) In a proceeding, the following privileges apply:

(1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) A mediator may refuse to disclose a mediation communication and may prevent any other person from disclosing a mediation communication of the mediator.

(3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of the disclosure or use of the evidence or information in a mediation.

Sec. 5. (a) A privilege under section 4 of this chapter may be waived in a record or waived orally during a proceeding if it is expressly waived by all parties to the mediation and:

(1) in the case of the privilege of a mediator, it is expressly

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1 waived by the mediator; and

2 (2) in the case of the privilege of a nonparty participant, it is
3 expressly waived by the nonparty participant.

4 (b) A person that discloses or makes a representation about a
5 mediation communication that prejudices another person in a
6 proceeding is precluded from asserting a privilege under section 4
7 of this chapter but only to the extent necessary to enable the person
8 prejudiced to respond to the representation or disclosure.

9 (c) A person that intentionally uses a mediation to plan, attempt
10 to commit, or commit a crime or to conceal an ongoing crime or
11 ongoing criminal activity is precluded from asserting a privilege
12 under section 4 of this chapter.

13 Sec. 6. (a) There is no privilege under section 4 of this chapter
14 for a mediation communication that is:

15 (1) in an agreement evidenced by a record signed by all
16 parties to the agreement;

17 (2) available to the public under IC 5-14-3 or made during a
18 session of a mediation that is open, or is required by law to be
19 open, to the public;

20 (3) a threat or statement of a plan to inflict bodily injury,
21 commit a crime of violence under IC 35-50-1-2, or commit a
22 crime involving bodily injury;

23 (4) intentionally used to plan a crime, attempt to commit or
24 commit a crime, or conceal an ongoing crime or ongoing
25 criminal activity;

26 (5) sought or offered to prove or disprove a claim or
27 complaint of professional misconduct or malpractice filed
28 against a mediator;

29 (6) except as otherwise provided in subsection (c), sought or
30 offered to prove or disprove a claim or complaint of
31 professional misconduct or malpractice filed against a
32 mediation party, nonparty participant, or representative of a
33 party based on conduct occurring during a mediation;

34 (7) sought or offered to prove or disprove abuse, neglect,
35 abandonment, or exploitation in a proceeding in which a child
36 or adult protective services agency is a party unless the public
37 agency participates in the child or adult protection mediation;
38 or

39 (8) required to be disclosed under IC 31-33-5.

40 (b) There is no privilege under section 4 of this chapter if a
41 court, an administrative agency, or an arbitrator finds, after a
42 hearing in camera, that the party seeking discovery or the

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proponent of the evidence has shown that:

- (1) the evidence is not otherwise available;
- (2) there is a need for the evidence that substantially outweighs the interest in protecting confidentiality; and
- (3) the mediation communication is sought or offered in:
 - (A) a court proceeding involving a felony or misdemeanor; or
 - (B) except as provided in subsection (c), a proceeding to prove a claim to rescind or to reform or a defense to avoid liability on a contract arising out of the mediation.

(c) A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6) or (b)(3)(B).

(d) If a mediation communication is not privileged under subsection (a) or (b), only the part of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection (a) or (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

Sec. 7. (a) Except as required in subsection (b) or by rules adopted by the supreme court, a mediator may not make a report, an assessment, an evaluation, a recommendation, a finding, or other communication regarding a mediation to a court, an administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation.

(b) A mediator may disclose:

- (1) whether the mediation occurred or has terminated, whether a settlement was reached, and the attendance;
- (2) a mediation communication as permitted under section 6 of this chapter; or
- (3) a mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment.

(c) A communication made in violation of subsection (a) may not be considered by a court, an administrative agency, or an arbitrator.

Sec. 8. Unless subject to IC 5-14-1.5 or IC 5-14-3, mediation communications are confidential to the extent agreed upon by the parties or provided by other law or rule of Indiana.

Sec. 9. (a) Before accepting a mediation, an individual who is requested to serve as a mediator shall:

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(1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and

(2) disclose any such known facts to the mediation parties as soon as is practical.

(b) If a mediator learns any facts described in subsection (a)(1) after accepting a mediation, the mediator shall disclose the facts as soon as is practicable.

(c) At the request of a mediation party, an individual who is requested to serve as a mediator shall disclose the mediator's qualifications to mediate a dispute.

(d) A person that violates subsection (a), (b), or (g) is precluded by the violation from asserting a privilege under section 4 of this chapter.

(e) Subsections (a), (b), (c), and (g) do not apply to an individual acting as a judge.

(f) Subject to rules adopted by the supreme court, this chapter does not require that a mediator have a special qualification by background or profession.

(g) A mediator must be impartial unless, after disclosure of the facts required to be disclosed under subsections (a) and (b), the parties agree otherwise.

Sec. 10. An attorney or other individual designated by a party may accompany the party to and participate in a mediation. A waiver of participation given before the mediation may be rescinded.

Sec. 11. This chapter modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 et seq., but this chapter does not modify, limit, or supersede Section 101(c) of that act or authorize electronic delivery of any of the notices described in Section 103(b) of that act.

Sec. 12. In applying and construing this chapter, consideration should be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Sec. 13. The provisions of this chapter are severable in the manner provided by IC 1-1-8(b).

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